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No. 90-593

DEC 14. 1990
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In the Supreme Court of the United States

OCTOBER TERM, 1990

ALLEN C. KAISER, PETITIONER

v.

UNITED STATES POSTAL SERVICE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a Postal Service employee who claims that his wages were unlawfully reduced after he elected to become a rural carrier has an implied right of action under the Postal Reorganization Act, 39 U.S.C. 1006, against the Postal Service and the union that negotiated the relevant wage scale.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A10) is reported at 908 F.2d 47. The opinion of the district court (Pet. App. A13-A24) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 10, 1990. The petition for a writ of certiorari was filed on October 9, 1990 (a Tuesday following a federal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Postal Reorganization Act provides in pertinent part (39 U.S.C. 1006):

> Officers and employees in the postal career service of the Postal Service shall be eligible for promotion or transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified. The authority given by this section shall be used to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services.

STATEMENT

1. The National Rural Letter Carriers' Association (NRLCA) is the exclusive collective bargaining representative for all rural letter carriers. In 1984, the NRLCA and the Postal Service were unable to agree on the terms of a collective bargaining agreement. In accordance with 39 U.S.C. 1207(c), the dispute was referred to binding arbitration, and a panel headed by Arbitrator Marlin Volz issued an award determining the terms of an agreement covering the period from 1984 through 1988. Article 9.1.B.1 of this agreement established an entry wage level, known as "Step B," for "all new regular [rural] carrier appointees."[1]

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[1] Article 9.1.B.1 provided:

> There shall be a new Rural Carrier Evaluated Schedule, which expands each evaluated level to 14 steps by adding two (2) new lower steps. These two (2) lower steps shall be designated Steps B and C. (There shall be no Step A.) Effective January 19, 1985, all new regular carrier appointees will begin at Step B, except for sub-

In 1988, the NRLCA and the Postal Service negotiated a successor agreement in which Article 9.1.B.1 was carried forward without change. The NRLCA and the Postal Service agree that this contract provision requires non-rural carrier postal employees who become rural carriers to begin at the Step B wage level. See *McGarigle* v. *United States Postal Service*, 904 F.2d 687 (Fed. Cir. 1990).

2. In 1987, petitioner, a city letter carrier who had passed the examination to become a rural carrier, sought and was offered a position as a regular rural carrier. In accordance with the collective bargaining agreement, petitioner was compensated at the Step B wage rate when he became a rural carrier. Alleging that he had accepted the new position in reliance on representations by Postal Service officials that he would retain the higher step and salary he had attained as a city carrier, petitioner initiated grievance proceedings under the collective bargaining agreement. Pet. App. A2.

Without exhausting contractual grievance procedures, petitioner commenced this action in the United States District Court for the Eastern District of Michigan.[2] The complaint, which was brought on behalf of petitioner and a putative class of similarly

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stitute rural carriers who convert to regular status. Substitute rural carriers will be converted to regular carrier status at Step 8 or their existing step, whichever is lower, provided, however, that substitutes serving in excess of 90 days on a vacant route at the time of conversion will convert at their existing step.

[2] The grievance procedure went forward while this action was pending. Petitioner's grievance—along with similar grievances asserted by other Postal Service employees—was heard by an arbitrator on June 7, 1989. An award was issued on November 15, 1989, denying the grievances.

situated Postal Service employees, alleged that compensating urban carriers who were reassigned to positions as rural carriers at the Step B rate violated the Postal Reorganization Act, 39 U.S.C. 1006.[3] The district court held that Section 1006 does not give rise to a private right of action and dismissed the suit. Pet. App. A19-A24.

3. The court of appeals affirmed. Pet. App. A1-A10. In determining whether Section 1006 confers an implied right of action, the court applied the general framework of *Cort* v. *Ash*, 422 U.S. 66 (1975). The court of appeals acknowledged that petitioner was a member of the class for whose "especial benefit" Section 1006 was created, since that provision "was enacted to guarantee the right of employees in the postal service to be eligible for transfers and promotions." Pet. App. A6. The court found, however, no explicit or implicit indication of an intent on Congress's part to create a private right of action for an alleged violation of Section 1006.

The language of Section 1006, the court explained, "does not evidence an intent to create a private cause of action." Pet. App. A6. The court stressed that Section 1006 provides that "career postal service employees shall be *eligible* for transfer and promotion * * *, but it does not *entitle* them to transfer and promotion." *Ibid.* "[M]erely making employees

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[3] The complaint also alleged that the NRLCA had breached its duty of fair representation in processing petitioner's grievance and that the Postal Service had breached the collective bargaining agreement. Both lower courts rejected these claims because petitioner brought them without first exhausting his contractual remedies. Pet. App. A4-A5, A15-A19. The petition does not seek further review of the fair representation claim (see Pet. 9 n.6) or of the lower courts' determination that petitioner failed to exhaust his remedies.

eligible for transfer and promotion," the court continued, does not "impl[y] a congressional intent to vest employees with a legal cause of action whenever a transfer or promotion is denied." *Ibid.*

The court also found no support for an implied right of action in the statute's legislative history or the legislative scheme. In reaching that conclusion, the court relied upon *Blaze* v. *Payne*, 819 F.2d 128 (5th Cir. 1987), and *Gaj* v. *United States Postal Service*, 800 F.2d 64 (3d Cir. 1986), decisions that had rejected attempts to assert private rights of action under another Section of the Postal Reorganization Act, 39 U.S.C. 1001(b). "Having determined that neither the language, structure, nor the legislative history of the statute shows a congressional intent to fashion an implied private remedy," the court found it unnecessary to consider whether such a remedy would be consistent with the underlying purposes of the legislative scheme or whether the claim was of a type that had traditionally been left to state law. Pet. App. A9-A10; see *id.* at A5-A6.

ARGUMENT

The court of appeals correctly applied well-established legal principles governing the availability of implied rights of action. The court's determination—that Section 1006 does not give rise to an implied right of action in petitioner's favor—does not conflict with any decision of this Court or of another court of appeals. To the contrary, that determination is consistent with decisions in other circuits that have refused to recognize private rights of action under a similar provision of the Postal Reorganization Act. Further review is not warranted.

1. Petitioner does not suggest that the court of appeals misapprehended the general principles appli-

cable to this case. As the court of appeals recognized, the availability of an implied right of action is governed by standards set forth in *Cort* v. *Ash*, *supra*, and its progeny. "In determining whether to infer a private cause of action from a federal statute, [the] focal point is Congress's intent in enacting the statute." *Thompson* v. *Thompson*, 484 U.S. 174, 179 (1988). The four factors set out in *Cort* v. *Ash*, *supra*, along with "other tools of statutory construction," serve as "guides to discerning that intent." 484 U.S. at 179. To ascertain Congress's intent under a particular statute, a court

> look[s] first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief. Then [it] review[s] the legislative history and other traditional aids of statutory interpretation to determine congressional intent.

Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981). Accord *Cort* v. *Ash*, 422 U.S. at 78.

The court of appeals' determination that Section 1006 does not give rise to an implied right of action in petitioner's favor was faithful to these principles.

a. As the court recognized, Section 1006 is phrased in very general terms. The statute makes Postal Service employees "eligible for promotion and transfer to any other position in the Postal Service or the executive branch of the Government of the United States for which they are qualified" and directs responsible officials to exercise their authority to grant promotions or transfers so as "to provide a maximum degree of career promotion opportunities for officers and employees and to insure continued improvement of postal services." 39 U.S.C. 1006. As petitioner

notes, Section 1006 consists of "general pronouncements, with no specific directives for compliance." Pet. 12. The statute does not entitle any employee to a transfer on any particular terms.

The generality of Section 1006's language is inconsistent with petitioner's claim that it is enforceable by means of actions by individual Postal Service employees. In making Postal Service employees *eligible* for transfer or promotion, Congress did not manifest an intention to afford each of those 750,000 employees a judicial remedy for claims that particular transfers or promotions—or the resulting terms and conditions of employment—were inconsistent with the goal of maximizing "career promotion opportunities" for the Postal Service or of insuring "continued improvement of postal services." 39 U.S.C. 1006.

b. The remainder of the statutory scheme reinforces the conclusion that Congress did not intend to allow individual employees to enforce Section 1006 in private actions. Other provisions of the Postal Reorganization Act delegate broad authority to the Postal Service to determine its own personnel policies. For instance, the Postal Service is empowered to appoint all of its officers and employees, 39 U.S.C. 1001(a); to establish procedures for appointments and promotions, 39 U.S.C. 1001(b); and to classify and fix the compensation and benefits of its officers and employees, 39 U.S.C. 1003.

Furthermore, when it exercises its broad authority in personnel matters, the Postal Service is required to operate within a system of collective bargaining that is virtually identical—except that strikes and lockouts are prohibited—to the regime prevailing in the private sector. 39 U.S.C. 1201-1209. Under 39 U.S.C. 1209(a), employee-management relations are subject, except when inconsistent with the Postal Re-

organization Act, to the provisions of the National Labor Relations Act. Terms and conditions of employment for employees such as petitioner—including wages, seniority, job assignment rights, and procedures for resolving employee grievances—are subject to collective bargaining. In the event of an impasse, binding arbitration is used to determine terms of employment. 39 U.S.C. 1207.[4] The contractual provision at issue here, which required petitioner to be compensated at the Step B rate, resulted from the implementation of these provisions.

Finally, although the Postal Service is generally exempted from federal laws regarding public employees, 39 U.S.C. 410(a), Postal Service employees may appeal certain adverse personnel actions to the Merit Systems Protection Board and obtain judicial review of MSPB determinations, 39 U.S.C. 1005(a) (making 5 U.S.C. 7501 *et seq.* applicable to Postal Service employees). See *Witzkoske* v. *United States Postal Service*, 848 F.2d 70 (5th Cir. 1988); *Diaz* v. *United States Postal Service*, 853 F.2d 5 (1st Cir. 1988). These express remedies do not encompass petitioner's claim. See *McGarigle* v. *United States Postal Service, supra.* In the face of Congress's decision to provide employees with limited express remedies, the courts should be very reluctant to recognize additional implied remedies.[5]

The regime established by the Postal Reorganization Act—which confers broad authority on the Postal

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[4] Before enactment of the Postal Reorganization Act, Congress directly classified Postal Service employees and fixed their compensation and benefits. See *National Ass'n of Postal Supervisors* v. *United States Postal Service*, 602 F.2d 420, 425 (D.C. Cir. 1979).

[5] Cf. *United States* v. *Fausto*, 484 U.S. 439 (1988); *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988).

Service to adopt personnel policies and to enter collective bargaining agreements establishing terms and conditions of employment and which gives employees specific rights to challenge some adverse personnel actions—is fundamentally inconsistent with recognition of an implied right of action for any alleged violation of Section 1006's broad directives. As the D.C. Circuit observed in *National Ass'n of Postal Supervisors* v. *United States Postal Service*, 602 F.2d 420, 431-432 (D.C. Cir. 1979):

> [I]n our judgment * * * Congress intended to vest the Postal Service with broad discretion in setting compensation policies and to limit judicial oversight of the Postal Service's exercise of that discretion. Judicial regulation of the Postal Service's compensation decisions can only undermine the legislative determination that the new postal management must have the freedom given by the statute to control costs and to manage the new agency in a manner consistent with its views of what is the economical and efficient thing to do.

c. The legislative history confirms that the Postal Reorganization Act was designed to "[e]liminate serious handicaps that [were] outmoded, unnecessary, and inconsistent with the modern management and business practices that must be available if the American public is to enjoy efficient and economical postal service." H.R. Rep. No. 1104, 91st Cong., 2d Sess. 2 (1970). Congress recognized that "[p]ostal management has been severely and unjustly hampered in its efforts to administer the Department in a businesslike way." *Id.* at 5. The Act was designed "to increase the ability of the Postal Service management to make decisions necessary to the efficient and effective operation of the postal system." *Buchanan* v. *United States Postal Service*, 508 F.2d 259, 263

(5th Cir. 1975). A Congress intent on launching the Postal Service into the commercial world, *Franchise Tax Bd.* v. *United States Postal Service*, 467 U.S. 512, 520 (1984), could not have intended to provide Postal Service employees with a right to obtain a judicial determination of whether any individual promotion or reassignment was consistent with the general standards set forth in Section 1006.

2. As petitioner acknowledges in describing this case as one "of first impression under the PRA" (Pet. 12), no court has recognized an implied right of action under Section 1006.[e] Thus, there is no conflict among the circuits on the question presented by the petition.

As the court of appeals noted, moreover, its decision is consistent with decisions from two other circuits that refused to recognize implied rights of action under a comparable provision of the Postal Reorganization Act, 39 U.S.C. 1001(b). *Blaze* v. *Payne*, 819 F.2d 128 (5th Cir. 1987); *Gaj* v. *United States Postal Service*, 800 F.2d 64 (3d Cir. 1986). Accord *Blair* v. *United States Postal Service*, 657 F. Supp. 524 (S.D. Tex. 1987). Section 1001(b) directs the Postal Service, in terms reminiscent of Section 1006's broad directives regarding transfers and promotions, to "establish procedures * * * to assure its officers and employees meaningful opportunities for

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[e] Two unpublished district court decisions have held, consistent with the court of appeals' decision in this case, that Section 1006 does not give rise to an implied right of action. *Stupy* v. *United States Postal Service*, No. CIV 88-456-TUC-WDB (D. Ariz. Jan. 8, 1990); *Glenn* v. *United States Postal Service*, No. TCA 88-40090-MMP (N.D. Fla. July 18, 1990). The decision in *Stupy* has been appealed to the Ninth Circuit; the appeal remains pending. See also *McGarigle* v. *United States Postal Service*, 904 F.2d at 691-692 & n.7.

promotion and career development and to assure its officers and employees full protection of their employment rights by guaranteeing them an opportunity for a fair hearing on adverse actions."

In *Gaj*, a former postal employee alleged that the Postal Service violated Section 1001(b) when it refused to rehire him. The Third Circuit refused to recognize an implied right of action for a violation of that Section, explaining (800 F.2d at 68):

> The clear intent of Congress in passing the Postal Reorganization Act was to make the Postal Service an independent executive agency to improve the efficiency of the mail system, to improve labor management relations, and to make the Postal Service self-supporting. 39 U.S.C. § 101. Neither the language of the statute nor its legislative history shows that Congress intended to create a private remedy.

Similarly, in *Blaze*, the plaintiff sought damages arising from a suspension allegedly in violation of Section 1001(b). The Fifth Circuit quoted from *Gaj* with approval and continued (819 F.2d at 130):

> Reinforcing our conclusion that Congress did not intend to authorize an additional employee remedy in § 1001(b) is the otherwise comprehensive labor law scheme that was embodied in the Postal Reorganization Act, 39 U.S.C. § 101 et seq., and was modeled after private sector labor law. * * * Pursuant to this scheme, postal employees were given full right to bargain collectively over their wages, hours, and conditions of employment through exclusive bargaining representatives. * * * In the face of this carefully crafted body of labor law pronouncements, the Third Circuit's description of Congressional intent [in *Gaj*] is, if anything, an understate-

ment. There is no room for the weedlike implied remedy sought by Blaze in the flourishing garden of express employee remedies created pursuant to the Postal Reorganization Act.

The same reasoning forecloses recognition of an implied right of action under Section 1006.[7] Both Section 1001 and Section 1006 establish general standards and guidelines for the operation of the Postal Service, but neither confers judicially enforceable rights of action on individual Postal Service employees.

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[7] The petition lists as "questions presented" the issues whether Article 9.1.B.1 of the collective bargaining agreement required petitioner to be paid at the Step B rate and, if so, whether the agreement was consistent with the Postal Reorganization Act, 39 U.S.C. 1006. Pet. i-ii. However, neither question warrants review by this Court. With respect to the former question, the interpretation of the collective bargaining agreement was the subject of the grievance proceedings that were pending when petitioner commenced this action. Both lower courts concluded that petitioner failed to exhaust his contractual remedies before commencing this suit, and the correctness of the arbitrators' determination that petitioner was paid in accordance with the contract is not properly before this Court. With respect to the latter question, the availability of an implied right of action to enforce Section 1006 is a necessary predicate for consideration of the merits of his claim that the contract violates Section 1006. In any event, the court of appeals correctly held that paying petitioner at the Step B rate would not violate Section 1006. Pet. App. A10.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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